Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Hyperion Telecommunications, Inc. and Time Warner Petitions for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	))))))	CC Docket No. 97-146

To: The Commission

COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance ("RICA"), by its attorneys and in response to the Commission's invitation to submit further comments in the referenced dockets,[1] hereby submits comments to "update and refresh" the records in these proceedings on whether, in the Commission's words, "mandatory detariffing of CLEC interstate access service rates would provide a market-based deterrent to excessive terminating access charges."[2] The Commission's invitation arises from a recent court decision upholding a 1996 Commission order requiring mandatory detariffing for all interstate, domestic, interexchange services of nondominant

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[1] *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, Public Notice, DA 00-1268 (rel. June 16, 2000)("Public Notice").

[2] *Id.*

interexchange carriers.[3] The Commission seeks comment on whether and, if so, how, mandatory detariffing provides a market solution to purported problems arising from CLEC access tariffs.[4]

RICA, an alliance of Competitive Local Exchange Carriers ("CLECs"), is a newly-formed organization, the members of which generally operate in rural areas, bringing the first, if not only, competitive local exchange and access service to vast geographic areas of the United States that otherwise would remain captive to the incumbent local exchange carrier ("ILEC"). RICA, an active participant in this proceeding,[5] is opposed to mandatory detariffing on the grounds that such action would undermine effective competition in the delivery of competitive local exchange services to rural areas across the United States.

I. The Commission's approach to the issue begins with an unsubstantiated premise.

The language of the Public Notice reveals the Commission's inaccurate prejudgment of

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[3] *MCI WorldCom v. FCC*, 209 F.3d 760 (D.C.Cir. 2000).

[4] Specifically, the Commission seeks comment on "how mandatory detariffing (1) addresses any market failure to constrain terminating access rates; (2) provides a market-based solution to excessive terminating charges by encouraging parties to negotiate terminating access charges; (3) provides the same benefits identified in the *Hyperion Order and NPRM* for permissive detariffing; (4) offers additional public interest benefits beyond permissive detariffing; (5) precludes the use of the filed rate doctrine to nullify contractual arrangements; (6) reduces the adminstrative burden on the Commission of maintaining tariffs; and (7) reduces the economic burden on the non-ILECs of filing tariffs. Public Notice at p.2.

[5] *See* Comments of the Rural Independent Competitive Alliance, CC Docket No. 96-262, CC Docket No. 94-1, CCB/CPD File No. 98-63 and CC Docket No. 98-157, filed October 29, 1999 ("RICA Comments"); Request for Emergency Temporary Relief of the Rural Independent Competitive Alliance, filed February 18, 2000; Reply Comments of the Rural Independent Competitive Alliance in response to comments on the Requests for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision (Public Notice, DA 00-1067 (Com.Car.Bur., May 15, 2000)), filed June 29, 2000.

the very basis of its inquiry. Requesting comment on methodologies to "constrain terminating access rates" and solutions to "excessive terminating charges,"[6] the Commission suggests, without support, that access charges, specifically CLEC access charges, are "excessive," in addition to being "unrestrained." These premises are false, and their acceptance indicates an inappropriate predisposition toward a "solution" which is unwarranted and contrary to the public interest.

As RICA has consistently demonstrated, there is no basis for an assumption that CLEC access charges are excessive.[7] RICA members have established access rates to recover the costs associated with the provision of access services to interexchange carriers. These costs typically are higher on a per-unit basis than incumbent access rates because the costs are spread over a smaller customer base. Further, these charges are based on recent investment in modern facilities built to compete with obsolete and fully depreciated plant of the incumbents. There is no evidence in this record, nor any other Commission proceeding, that supports a postulate of "excessive rates." To the contrary, Commission findings negate this unsubstantiated hypothesis.

The Commission has instead found[8] and affirmed[9] that "CLECs have not charged unreasonable terminating access rates and are not likely to do so in the future."[10] More recently,

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6 Public Notice at 2.

7 *See, e.g.*, RICA Comments at pp.15-16.

8 *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure Pricing, End User Common Line Charges*, CC Docket No.96-262, First Report and Order, FCC 97-158, para. 363 (rel. May 16, 1997).

9 *Hyperion Telecommunications, Inc.*, 8 CR 730, 737 (1997).

10 *Id.*

the Commission summarily rejected the argument "that any access rate greater than that charged by an incumbent LEC is necessarily unjust and unreasonable within the meaning of section 201(b) [of the Communications Act of 1934, as amended (the "Act")]."[11] Moreover, no party has filed a complaint alleging that any RICA member CLEC's access rates are unsupported or unsubstantiated.

This failure of complainants to avail themselves of the cost-based challenge available under the Section 208 complaint process reveals the other fallacy underlying the Commission's presumption that access charges are "unrestrained." Clearly, in a tariff environment, a tested methodology exists for "restraining" access charges which are suspected of being "excessive." Furthermore, as discussed below, the Commission's apparent preference that so-called market forces supplant tariffs on a mandatory basis is based upon a misapprehension of the relative bargaining position of market participants.

II. Mandatory detariffing will result in competitive dislocations.

Mandatory replacement of tariffed service offerings with negotiated contracts increases, rather than decreases, the administrative burden for small, rural carriers. Effective implementation of mandatory detariffing would require these small companies to negotiate with each and every interexchange carrier in the country to ensure compensation for terminating access services, and with every interexchange carrier offering service to its subscribers for originating service. Large interexchange companies will have excessive power at the bargaining table: with historically high penetration in rural communities, the major interexchange carriers

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[11] *Sprint Communications Company, LP v. MCG Communications, Inc.*, Memorandum Opinion and Order, File No. EB-00-MD-002, FCC 00-206 (rel. June 9, 2000) at para. 7.

will demand (as they already have) pricing for access services which are below the CLECs' costs to provide such services. CLECs' ability to maintain competitive consumer pricing will suffer significant damage, resulting in threats to CLECs' very survival. In rural areas of the country, this will spell the demise of competition.[12]

The public interest demands that the impact on consumers of exchange services be examined carefully. In the competitive local exchange service market, compensatory access revenues are a necessary component of rational rate design, and follow the traditional and sanctioned approach of assessing costs on cost-causers. Both logic and market forces require CLECs to compete with ILECs on a playing field which is transparent to consumers. In denying smaller competitive carriers access to a tariff methodology, the Commission will force an imperfect overlay of marketplace forces (unsupported by relatively equal bargaining positions between access providers and access consumers) into an otherwise regulated service. The imposition of this extreme disadvantage undermines effective competition and, accordingly, is contrary to the public interest.

RICA is not insensitive to industry and public interest benefits in streamlining the regulatory process. In earlier comments, RICA proposed the establishment of a benchmark methodology to establish a presumptively reasonable rate, allowing carriers to demonstrate the reasonableness of rates which exceed the benchmark.[13] RICA maintains, however, that the relative "market" for the purchase and sale of access services is not sufficiently stable to ensure that the public, particularly in rural areas, is protected by market forces alone.

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[12] *See generally*, RICA Comments at pp. 18-21.

[13] *See*, RICA Comments, pp. 20-21.

III. The DC Circuit's interexchange detariffing decision does not support mandatory detariffing of access charges.

The Commission's interexchange detariffing decision, recently upheld by the United States Court of Appeals for the District of Columbia Circuit, was based upon a factor which is absent in the instant case. The Commission's action in that case affected the entire interexchange industry, not just one segment. In this instance, the Commission cannot find that a distinction between "large [ILEC] and small [CLEC] customers [is] immaterial, because the competitive benefits of detariffing would be felt by both."[14] ILEC access services will remain tariffed. Nor can the Commission purport to "establish market conditions that more closely resemble an unregulated environment"[15] when the vast majority of the industry remains regulated. And if, as the court found, the basic justification for the Commission's action is because its "focus was squarely on competition,"[16] this rationale also cannot be applied to the current issue. In the case of access charges, there simply is no connection between mandatory detariffing of access charges and enhancing competition among providers of local exchange services, interexchange services, or access services themselves. Accordingly, there exists no statutory basis for mandatory detariffing of CLEC access charges.

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14 *MCI WorldCom v. FCC*, 209 F.3d at 763.

15 *Id.* at 765 (citation omitted).

16 *Id.* at 766 n.5.

IV. Conclusion

In a burgeoning competitive environment, the Commission must take care that its actions promote, rather that deter, the competitive provision of services to consumers in all areas of the country. Where market forces are insufficiently mature to promote this goal, or to protect consumers adequately, judiciously applied regulatory methods are required. Experimentation with market substitutes for proven regulatory methodologies is particularly inappropriate where their introduction threatens the viability of nascent competitive ventures.

Respectfully submitted,

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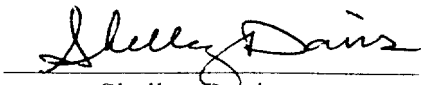
CERTIFICATE OF SERVICE

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Comments of the Rural Independent Competitive Alliance" was served on this 12th day of July 2000, by first class, U.S. mail, postage prepaid to the following parties:



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